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May 19, 1997

William F. Caton  
Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

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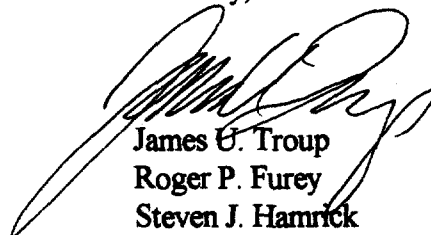
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: VarTec Telecom, Inc.'s Petition for Reconsideration  
and Emergency Motion for Stay

Dear Mr. Caton:

Attached please find an original and four copies of VarTec Telecom, Inc.'s ("VarTec") Petition for Reconsideration (the "Petition"), and an original and four copies of its Emergency Motion for Stay. VarTec is filing Exhibit One of the Petition under separate cover with a Request that Information be Withheld from Public Inspection, because that exhibit contains proprietary commercial information. If you have any questions concerning VarTec's pleadings, or if you require further information, kindly contact VarTec's undersigned counsel.

Sincerely,



James G. Troup  
Roger P. Furey  
Steven J. Hamrick

Enc.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY 19 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
Administration of the )  
North American Numbering Plan )  
Carrier Identification Codes ("CICs") )

CC Docket No. 92-237

**EMERGENCY MOTION FOR STAY OF  
VARTEC TELECOM, INC.**

VARTEC TELECOM, INC.

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May 19, 1997

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## **SUMMARY**

VarTec Telecom, Inc. ("VarTec") respectfully moves for a stay of implementation of the Commission's Second Report and Order (the "Report and Order") in CC Docket No. 92-237.

VarTec's request meets all four requirements for the grant of such a stay. There is a strong likelihood that VarTec will prevail on the merits of its appeal. The Report and Order prohibits VarTec from using its established carrier access codes ("CACs") despite the existence of a procedure which would provide for the grandfathering of most five digit CACs, while at the same time serving the Commission's objective of making more CACs available. This action is arbitrary and capricious and contrary to the stated reasoning behind the rulemaking. In addition, VarTec is likely to establish that the Commission's action constitutes an infringement of VarTec's rights under the First and Fifth Amendments to the U.S. Constitution, as well as a violation of the Regulatory Flexibility Act and the Communications Act.

If the stay is not granted, the loss to VarTec would be great, irreparable and certain to occur as VarTec will lose its CACs and the goodwill that it has developed through its CACs. VarTec will also suffer irreparable harm because it will be deprived of its constitutionally-protected rights under the First Amendment. Adequate compensatory or other corrective relief will be unavailable at a later date because VarTec will have already lost its goodwill and customers and no truly effective means exists to fully salvage that goodwill and customer base.

The stay requested herein would not substantially harm any other party and would serve the public interest. In fact, a grant of this stay would ensure that the ultimate goal of the Commission is carried out. The public interest is best served by granting a stay that would maximize the number of CACs available and allow the "dial around" carriers to preserve their current CACs.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Administration of the	)	CC Docket No. 92-237
North American Numbering Plan	)	
Carrier Identification Codes ("CICs")	)	

TO: The Commission

**EMERGENCY MOTION FOR STAY OF  
VARTEC TELECOM, INC.**

VarTec Telecom, Inc. ("VarTec"), by its attorneys and pursuant to §§ 1.43 and 1.44(e) of the Commission's rules, respectfully moves for a stay of implementation of the Commission's Second Report and Order (the "Report and Order") in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

**A. VarTec and Carrier Access Codes**

VarTec Telecom, Inc. is an interexchange carrier ("IXC"). The company is currently authorized to provide intrastate interexchange services in forty-eight (48) states and the District of Columbia. VarTec currently provides its "dial-around" long distance services to millions of customers throughout the United States, and has accomplished considerable success providing a less expensive, alternative long distance service. VarTec's success is attributable, in part, to its strategy of offering competitively-priced long distance services to residential and business end

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<sup>1</sup> Second Report and Order, 62 Fed. Reg. 19056 (April 18, 1997).

users. VarTec provides services to these users through five digit Carrier Access Codes ("CACs"), of which the last three digits are Carrier Identification Codes ("CICs") that are exclusive to VarTec.

The CACs allow local exchange carriers ("LECs"), such as Bell Atlantic, to identify which long distance service consumers would like to use when placing long distance calls. Customers who access these codes are allowed to choose the long distance carrier of their choice without regard to which long distance carrier they are presubscribed. The CAC also allows consumers to make long distance telephone calls at discount prices.

When a user dials one of VarTec's CACs, the long distance telephone call is routed to the company by LECs, with whom VarTec has previously purchased originating access and entered into billing and collection service agreements. VarTec's success is directly attributable to its strategy of offering competitively-priced long distance services to these anonymous residential and business end users who access VarTec through its Feature Group D ("FGD") CICs.

Originally, CACs were set up to provide consumers with equal access (10XXX) to all long distance carriers. CACs enable smaller IXC's to market their services on a "try us, you'll like us" basis. Naturally, this process is extremely difficult because a large percentage of consumers in the United States make long distance calls by utilizing their presubscribed IXC. Most consumers are presubscribed to either AT&T, MCI or Sprint. In fact, AT&T, MCI and Sprint through their presubscribed customer bases control over 90% of the long distance toll market. That leaves VarTec and other small IXC's less than 10% of the market to share.

Therefore, VarTec, as well as many other IXC's, depend on their customers utilizing their CACs as a means of competing with AT&T, MCI, and Sprint. VarTec has spent the past seven years building a customer base that habitually uses this "dial-around" procedure to access VarTec's

long-distance service. Each year, VarTec mails tens of millions of marketing pieces promoting its five digit CACs. Callers currently utilizing VarTec's CACs to reach VarTec for their long distance needs on a particular call basis generate more than 90 percent of VarTec's customer base and associated revenues. VarTec has sent direct mailers to market its CACs to consumers and this has both saved long distance telephone service consumers money and further increased competition in the market for such telecommunications services. Thus, a significant percentage of VarTec's substantial customer base and associated toll revenues is generated from callers currently utilizing the company's CACs to reach VarTec for their long distance telephone service needs on a particular call basis rather than being presubscribed to VarTec's long distance service as their primary IXC.

**B. The Commission's Proposed Changes to CIC Administration and VarTec's Grandfathering Proposal**

The Commission has proposed changes to its CIC administration. These changes originated in April 1994 when the Commission proposed an industry plan to expand FGD CICs from three digits to four digits.<sup>2</sup> The Commission's goal was to go to four digits in order to increase the number of CICs available because the Commission believed that the entire pool of three digit CICs would eventually be assigned and wanted to ensure that it could meet future demand for CICs.<sup>3</sup> At this time, the Commission proposed a six-year transition, or permissive dialing period, to move the industry from three to four digit CICs.<sup>4</sup>

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<sup>2</sup> See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994) ("NPRM").

<sup>3</sup> See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994) ("NPRM").

<sup>4</sup> Id.

In response to this Notice of Proposed Rulemaking ("NPRM") that introduced these proposed changes, VarTec filed comments. In its comments, VarTec proposed a plan to "grandfather" and, thereby, maintain VarTec's and other companies' already recognized three digit CICs after the end of the permissive (transition) dialing period. Currently, during the transition, callers and carriers are using both three digit CICs and four digit CICs beginning with a "5" or "6."<sup>5</sup> After the transition period, the Commission intends to eliminate all current three digit CICs and reassign the new four digit CICs randomly.

VarTec's grandfathering proposal would lead to an increase in the number of available CICs in the long run, which is the very goal of the Commission in this proceeding.<sup>6</sup> Similar software and switch reprogramming that currently allows switches to read both three digit and four digit CICs beginning with a "5" or "6", such as 10636 (one of VarTec's CACs) and 1016XXX, will allow for the implementation of VarTec's grandfathering plan. To comply with the Commission's Report and Order, all switches should be able to read a seven digit CAC by January 1, 1998. Under VarTec's grandfathering plan, all three digit CICs starting with "1" would be taken out of use so that a switch does not confuse 101XX with 101XXXX. Then, a switch capable of translating a five-digit CAC and a seven-digit CAC will be able to properly route the following CACs: 100XX, 102XX, 103XX, 104XX, 105XX, 106XX, 107XX, 108XX, 109XX, 1010XXX, 1011XXX, 1012XXX, 1013XXX, 1014XXX, 1015XXX, 1016XXX, 1017XXX, 1018XXX and 1019XXX.

Although VarTec's grandfathering plan would require the reassignment of three-digit CICs that have "1" as the first digit, only 70 such CICs exist. Thus, the reassignment of 70 CICs makes

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<sup>5</sup> Id.

<sup>6</sup> See NPRM at para. 2.



much more sense and is much easier than reassigning as many as 969 CICs as would be required by the Commission's plan. Furthermore, most carriers that have been assigned three digit CICs starting with "1" also have been assigned three digit CICs starting with numbers other than "1" and can continue to use those CICs under VarTec's grandfathering plan. By allowing the use of other three digit and four digit CICs, the Commission would, in the long run, make 900 more CICs available for use, than under its current expansion plan. Thus, VarTec's plan better achieves the goal of the Commission's NPRM's stated goal than does the Commission's announced plan.

On April 30, 1996, the Commission issued a Public Notice to request information to determine whether or not it should shorten the transition period that it had previously planned.<sup>7</sup> In its Report and Order, the Commission decided to abbreviate its plan to use a six-year transition period to use a four year transition period that would end on January 1, 1998. However, the Commission did this without first requiring reclamation of unused three digit CICs and either grandfathering the use of any five digit CACs or requiring LECs to provide an intercept message informing consumers of the new CAC when they dial the old CAC.<sup>8</sup> Consequently, the Commission's plan would eliminate all three digit CICs without grandfathering the use of any of the CICs that have been assigned as of this date.<sup>9</sup>

**B. TEC is Likely to Prevail on the Merits of its Appeal**

Again, after the Commission's Report and Order, VarTec, as well as other carriers, made comments to the Commission and proposed the coexistence of three digit and four digit CICs.<sup>10</sup> The

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<sup>7</sup> See Further Comments, Carrier Identification Codes, CC Docket No. 92-237, Public Notice DA 96-678 (Common Carrier Bureau, April 30, 1996) ("Public Notice").

<sup>8</sup> See Report and Order at para. 4.

<sup>9</sup> See Report and Order at para. 4.

<sup>10</sup> See Comments at 2.

Commission, again, refused to adopt this “grandfathering” proposal in its Report and Order.<sup>11</sup> Because the Commission has not adopted any version of a grandfathering proposal, hundreds of CICs have been and will be sacrificed for future use which is contrary to the Commission’s original intended goal, which was to increase the number of CICs available for use.

The only basis for refusal of the grandfathering proposal by the Commission was that it was concerned that grandfathering would interfere with four digit CICs that begin with the numbers “5” or “6.”<sup>12</sup> At present, the Commission has already assigned four digit CICs that are being used concurrently with the three digit CICs without any problem to, or caused by, the four digit CICs beginning with the same numbers. For example, VarTec has used its three digit CICs beginning with “5” and “6” (595 and 636) without any problem to, or caused by, the four digit CICs beginning with the same numbers.

Furthermore, this new position by the Commission is inconsistent with the Commission’s own statements in the Report and Order in which the Commission concluded that the dialing disparity between three and four digit CICs during the transition period was not problematic because it did not violate either Section 201(b) of the Act’s prohibition against unreasonable practices or Section 202(a)’s prohibition against unreasonable discrimination.<sup>13</sup> The Commission reached this conclusion because “the transition is reasonable and necessary to avoid a flash-cut conversion to four digit CICs which would be contrary to the public interest.”<sup>14</sup>

If the FCC’s Report and Order is implemented, VarTec will lose its rights to use its CACs and, thereby, lose the goodwill associated with those CACs and the customers that presently use VarTec’s

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<sup>11</sup> See Report and Order.

<sup>12</sup> See Report and Order at para. 46.

<sup>13</sup> See Report and Order at para. 32.

<sup>14</sup> Id.

“dial around” services. Practically speaking, customers will dial VarTec’s CAC and nothing will be there. The Report and Order does not provide for a message directing the consumer to VarTec’s new randomly assigned CAC. Therefore, the customers that currently use VarTec as its “dial-around” carrier will not be able to find VarTec, or worse, will believe that the company is either undependable or out of business.

Furthermore, the Commission’s plan does not adequately provide for customer education. The Report and Order does not require the local exchange carriers (“LECs”) to inform consumers nor does it propose that anyone else educate the public. That burden rests with the small IXC’s, like VarTec. VarTec’s only possible means of attempting to contact these customers is by attempting to match their phone numbers (the only information that VarTec has) with addresses. This process is time-consuming, expensive and not always reliable.

The customer confusion resulting from the Commission’s plan will cause irreparable harm to VarTec as well as other small IXC’s throughout the U.S. If the Commission forces small interexchange carriers to switch to the expanded CAC format, it will make it increasingly more difficult for small IXC’s to market their services to consumers. Thus, both the expansion of CAC’s as well as the terms associated with the implementation process itself are matters of critical importance to VarTec. Customer confusion as a result of the implementation of the expanded CAC’s will have a devastating impact on the company’s business.

The elimination of all five-digit CAC’s will suppress competition by creating customer confusion and frustration, ultimately leading to the exclusive use of entrenched presubscribed long distance carriers, and the diminution of business for smaller dial-around long distance telephone services, such as that provided by VarTec. Clearly this is contrary to public interest. VarTec would be aggrieved and

adversely affected by the implementation of the Commission's CAC "expansion." VarTec, therefore, has standing as a party in interest to file the instant motion for stay.<sup>15</sup>

## II. ARGUMENT

### A. VarTec's Motion Meets the Criteria for Granting a StayA.TEC's Motion Meets the Criteria for Granting a Stay

The Commission evaluates motions for stay under well-established principles. To support a stay, VarTec must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.<sup>16</sup> The courts contemplate that the Commission will stay its own actions when it has "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained."<sup>17</sup> VarTec's request for a stay meets these requirements.

In weighing these factors, this Court has recognized that the required showing on the first factor (likelihood of prevailing on the merits) depends on the degree of irreparable harm that will occur absent the stay:

To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay

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<sup>15</sup> See, e.g., Clarke v. Securities Industry Assoc., 479 U.S. 388 (1987); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); NBC v. FCC, 132 F.2d 545, 548-549 (D.C. Cir.), aff'd, 318 U.S. 239 (1943).

<sup>16</sup> Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

<sup>17</sup> Id. At 844-845.

may be granted with either a high probability of success and some injury, or vice versa.<sup>18</sup>

**B. VarTec is Likely to Prevail on the Merits of its Appeal<sup>19</sup>**

**1. The Commission's Decision is Arbitrary and Capricious.**

Agency action that is arbitrary and capricious violates the APA.<sup>20</sup> The Commission's Report and Order is arbitrary and capricious because it does not further the Commission's goals in the above-captioned proceeding.<sup>21</sup> The primary purpose of the rulemaking was to maximize the number of CICs available for "new services and technologies and to support continued economic growth."<sup>22</sup> The Report and Order accomplishes the opposite. Denying VarTec's request to grandfather the five digit CACs actually decreases the number of available CICs in the long run, and creates consumer confusion that will cause dial-around businesses to suffer lost revenues, further depressing competition in the long-distance market. The Commission manages CICs to foster competition in interstate telecommunications.<sup>23</sup> An estimated 104 companies now have multiple CICs.<sup>24</sup> Because the

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<sup>18</sup> Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

<sup>19</sup> For a full discussion of the merits, please refer to the Petition for Reconsideration and its exhibits which we are incorporating by reference and filing contemporaneously with this pleading.

<sup>20</sup> 5 U.S.C. § 706.

<sup>21</sup> Bechtel v. FCC, 10 F.3d 875, 885-886 (D.C. Cir. 1993).

<sup>22</sup> NPRM at para.2.

<sup>23</sup> See Report and Order at para. 2 (citing Exchange Network Facilities for Interstate Access (ENHA), Memorandum Opinion and Order, 71 FCC 2d 440 (1979); MTS and WATS Market Structure, Report and Third Supplement Notice for Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); Electronic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnections, Jurisdictional Separators and Practices Relating to /Customer interconnection, Jurisdictional Separations and Rate Structures, Docket No. 20003, Second report (1980).

<sup>24</sup> Report and Order at n.9 (citing letter from Nancy Fears, Bell Communications research, NANP Administration, to Elizabeth Nightingale, FCC Common Carrier Bureau, dated April 4,

Commission acted arbitrarily and capriciously in adopting the Report and Order, it should reconsider and vacate its decision to eliminate all five digit CACs.

**2. The Commission's Report and Order Has Effected a Taking of VarTec's Property Interests Without Just Compensation in Violation of the Fifth Amendment.**

The Commission has violated the Fifth Amendment of the U.S. Constitution by taking VarTec's "property" without just compensation. Since the Communications Act does not authorize the Commission to take this valuable property in the course of regulating the telecommunications numbering system, the Commission's action is invalid and should be rescinded.<sup>25</sup>

The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." The Commission's actions in stripping VarTec of its five digit CACs effective January 1, 1998, would cause an uncompensated taking of several property interests of VarTec, including: the goodwill VarTec has established through several years of extensive (and expensive) marketing of its CACs; the service mark rights VarTec has established in its CACs; and VarTec's entitlement to engage in its chosen trade and business using the CACs in which it has invested tremendous resources with the reasonable expectation that it could continue to reap the benefits of that investment.

VarTec has built its entire business around the promotion of its CACs.<sup>26</sup> It has spent millions of dollars in marketing costs, including the development, production and mailing of promotional brochures, explanatory letters, and stickers, all of which prominently feature VarTec's CACs and which are carefully designed to communicate information about VarTec's CAC's to consumers. VarTec's

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1997).

<sup>25</sup> Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441, 1446 (D.C. Cir. 1994).

<sup>26</sup> VarTec's CACs are essential to VarTec's ability "to engage in a particular trade or business," which is in itself a property right subject to protection under the Fifth Amendment. Greene v. McElroy, 79 S.Ct. at 1411; Chalmers v. City of Los Angeles, 762 F.2d at 756-757.

customers are both familiar and comfortable with these CACs. Indeed, VarTec's CACs are the only means by which most of its customers recognize VarTec's service. Dial-around long-distance customers may not remember the name VarTec, but they do remember to dial "1-0-8-1-1" to receive VarTec's service. These CACs have come to represent all of the goodwill that VarTec has established in its company. If the CACs are taken away by the FCC's action, so will that goodwill be taken. VarTec will be forced to start from scratch. After spending years and tremendous sums of money carefully cultivating a customer base of people who know that they will receive the highest quality service when they dial "1-0-8-1-1"<sup>27</sup>, VarTec will be left with customers who call "1-0-8-1-1" after January and hear an error message.

VarTec's marketing and promotion of its CACs have given it rights under the trademark laws. Trademarks and service marks are property rights, entitled to all of the protections extended to other forms of private property.<sup>28</sup> A government taking of a trademark without providing just compensation is a clear violation of the Fifth Amendment to the Constitution.<sup>29</sup>

The Fifth Amendment mandates just compensation where a government action interferes with a reasonable investment-backed expectation and substantially diminishes the value of property owned

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<sup>27</sup> VarTec owns other CACs, but the 10811 is its most used and most valuable CAC, and so is used for example purposes herein.

<sup>28</sup> See e.g., The Trademark Cases, 100 U.S. 82 (1879) ("The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law . . .") (emphasis added).

<sup>29</sup> Maltina v. Cawy Bottling Co., 462 F.2d 1021, 1027 (5th Cir. 1972); see also Friedman v. Rogers, 440 U.S. 1, 12 n.11 (1979) (recognizing trade names as valuable property rights of a business, protected from appropriation by others, but noting that no claim of a taking without due process had been raised in that case).

by a business.<sup>30</sup> The Report and Order goes way beyond interfering with VarTec's reasonable expectations for a return on its investment, and way beyond diminishing the value of its CACs. It destroys those expectations and eliminates that value.

The Commission's actions also result in a per se, categorical taking of property rights, as was the case in Lucas.<sup>31</sup> VarTec has built a thriving and expanding long distance telephone service relying principally on its five digit CACs for its customer base. The Commission's Report and Order completely frustrates VarTec's constitutionally-protected entitlement--the right to preserve and increase its customer base and good will associated with its five digit CACs and to provide long distance telephone service to those customers that know VarTec only by its CACs. By requiring VarTec to sacrifice all economically beneficial uses of its five digit CACs without just compensation, the Commission has violated the Takings Clause of the Fifth Amendment.

Because the Commission imposed these regulations without compensating VarTec for the deprivation of its property interests, they violate the Fifth Amendment of the U.S. Constitution. Furthermore, because the Commission has not been expressly authorized by Congress to effect such a taking, VarTec is likely to establish on the merits that the Commission's action is invalid.<sup>32</sup>

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<sup>30</sup> See Ruckelshaus v. Monsanto, 467 U.S. at 1010-13; Tri-Bio Labs., Inc. v United States, 836 F.2d 135, 140-1 (3d Cir. 1987); see also Cabo Distributing Co., Inc. v. Brady, 821 F. Supp. 601, 609 (N.D.Cal.1992) (expenditures of substantial funds in reliance on certificates of label approval issued by Bureau of Alcohol, Tobacco & Firearms creates property rights in label subject to Fifth Amendment protection).

<sup>31</sup> Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2895 (1992) (where the Supreme Court held that when government calls upon the owner of property to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking).

<sup>32</sup> Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441, 1446 (D.C. Cir. 1994)



The Commission relies on 47 U.S.C. § 251(e)(1) for its authority in this action.<sup>33</sup> Section 251 generally authorizes the Commission to create or designate impartial entities to administer the telecommunications numbering system and to make numbers available, and it generally provides the Commission with jurisdiction over the North American Numbering Plan to the extent it pertains to the United States. Nowhere, however, is there any grant of authority for the Commission to take private property in the course of performing its general administrative function. Therefore, the Commission's action in taking all five digit CACs is impermissible, and should be rescinded.

**3. The Commission's Action Infringes VarTec's Rights Under the First Amendment**

Commercial speech is defined as that speech which proposes a commercial transaction.<sup>34</sup> Trademarks, trade names and other symbols used to communicate information to consumers about the owner's products or services are forms of commercial speech, entitled to protection under the First Amendment.<sup>35</sup> The nature of the service marks at issue here, VarTec's CACs, presents an even stronger case for commercial speech than most service marks because, in addition to serving as indications of the origin of VarTec's services (the function of a service mark), they also communicate useful information to consumers regarding the manner in which VarTec's services can be utilized.

Commercial speech restrictions must pass the demanding test set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission.<sup>36</sup> The Commission's action fails to meet the Central

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<sup>33</sup> Report and Order at ¶ 11.

<sup>34</sup> Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74 (1989).

<sup>35</sup> See, e.g., Friedman v. Rogers, 440 U.S. at 11; Hornell Brewing Co., Inc. v. Brady, 819 F. Supp. 1227, 1233 (E.D.N.Y. 1993); Sambo's of Ohio v. City Council of City of Toledo, 466 F. Supp. 177, 179 (N.D. Ohio 1979).

<sup>36</sup> 447 U.S. 557, 100 S. Ct. 2343, 2351 (1980). Under that test, regulation of commercial speech is permitted only where: (1) the speech concerns lawful activity and is not deceptive; (2) the regulation serves a substantial government interest; (3) the restriction directly advances the government's asserted interest; and (4) the restrictions are narrowly tailored and are "not more

Hudson test. For the reasons already discussed, VarTec's grandfathering plan comes closer to achieving the Commission's interest in making an increased number of CACs available than does the Commission's approach. The Commission is required to give alternatives that are less restrictive to commercial speech serious consideration, and choose those alternatives that will achieve the government interest with less intrusion on the First Amendment rights of the speaker, VarTec.<sup>37</sup> A restriction on commercial speech, such as that resulting from the Commission's action here, cannot be considered "sufficiently tailored to its goal" under the Central Hudson test if other options exist "which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights."<sup>38</sup> VarTec has presented the Commission with such an option, and thus far, the Commission has chosen to ignore this less restrictive option.

**4. The Report and Order Violates the Communications Act and The Regulatory Flexibility Act by Creating a New Market Entry Barrier for Small Businesses and Failing to Consider Alternatives that Will Have a Less Onerous Impact on Small Businesses.**

Pursuant to § 257 of the Communications Act, it is the duty of the Commission to eliminate market entry barriers for small businesses.<sup>39</sup> In adopting new regulations, the Regulatory Flexibility Act ("RFA") requires the Commission to consider significant alternatives that minimize the impact on small businesses.<sup>40</sup> These standards are part of the "existing rules and understandings" that allow a

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extensive than is necessary" to advance those interests. Id.

<sup>37</sup> City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 1510 n.13 (1993); Rubin v. Coors Brewing Co., \_\_\_ U.S. \_\_\_, 115 S.Ct. 1585, 1593 (1995); Hornell Brewing Co. v. Brady, 819 F. Supp. at 1239.

<sup>38</sup> Coors, 115 S. Ct. at 1593.

<sup>39</sup> 47 U.S.C. § 257.

<sup>40</sup> 5 U.S.C. § 603, et seq.

small company such as VarTec to compete against larger carriers, such as AT&T, by providing "dial-around" long distance telephone service.

Rather than provide regulatory flexibility for small businesses like VarTec, the Commission created a new market entry barrier for this small U.S. business by adopting a policy that completely frustrates VarTec's ability to compete against entrenched, presubscribed long distance carriers.<sup>41</sup> The Commission failed to adopt any alternatives minimizing the impact of its Report and Order, such as grandfathering five digit CACs. The elimination of VarTec's five digit CACs will make it significantly more difficult for VarTec to continue to provide service in the 48 states and the District of Columbia where it currently operates, and to expand its service to other states. This violates Section 257 of the Communications Act. The Commission failed to consider VarTec's plan allowing it to use its five digit CACs past December 31, 1997, and other proposals referenced infra thus violating the RFA. Such alternatives would minimize the impact of the CAC expansion on small interexchange carriers like VarTec. VarTec urges the Commission to eliminate the market entry barrier which it has improperly invoked on small interexchange carriers.

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<sup>41</sup> The Commission also rejected other VarTec comments that would promote fair competition, such as reclamation of all unused CICs, ordering LECs to educate consumers about the new CACs, and a "2-PIC" system whereby the customer chooses both an inter-LATA presubscribed carrier as well as an intra-LATA presubscribed carrier. The Commission also rejected VarTec's proposal that the Commission mandate LECs to provide an intercept message to any customers dialing the five digit CAC during the 12 months following the transition period, thereby informing the customer of the carrier's seven digit replacement CAC, and reducing the IXC's hardship in complying with the Report and Order. See Comments, filed June 6, 1994.

**C. VarTec Will Be Irreparably Harmed if the Stay is Not GrantedC.TEC Will Be Irreparably Harmed if the Stay is Not Granted**

VarTec will be irreparably harmed if implementation of the Commission's Report and Order is not stayed. Absent a stay, VarTec will lose 1) its current CACs, 2) its constitutional rights to freely speak by using its current CACs, 3) the goodwill associated with its CACs, and 4) the service mark rights that VarTec has developed in its CACs.

VarTec has marketed its services through direct mail and other means. Through this extensive and expensive marketing process, VarTec has invested significant resources to educate the public on how to access its services and access certain of its CACs, e.g. "1-0-8-1-1." VarTec has also developed common law trademark rights in certain of its CACs in that consumers have come to associate those CACs with long distance service from VarTec. The public has come to expect that by dialing VarTec's CACs they will access VarTec's high quality services and that in most cases this will result in a discount on the long distance services. VarTec has invested significant time and effort in developing these service mark rights and the associated goodwill.

The Commission's Report and Order proposes to eliminate these service mark rights and the associated goodwill that VarTec has developed at great expense, and to replace VarTec's well recognized CACs, with which it has developed considerable secondary meaning in the marketplace, with new and totally different CACs that will be assigned at random. Therefore, the injury that VarTec will suffer if this stay is not granted will be irreparable.

The Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."<sup>42</sup> In this case, VarTec will be denied its valuable Constitutional rights if the stay is not granted. Specifically, the Commission's plan would impair VarTec's rights of free speech under U.S. Const. amend. I by depriving VarTec of its commercial speech rights. VarTec owns its CACs, and has the right to continue to communicate a message to the public that they can do business with VarTec, and save money in many instances, by dialing "1-0-8-1-1". Under Elrod, the Commission's intended deprivation of VarTec's right to communicate this message constitutes irreparable harm.

VarTec will also suffer irreparable harm as a result of the Commission's deprivation of its service mark. Like violations of the First Amendment, trademark, trade name and service mark infringement constitutes irreparable harm per se.<sup>43</sup> The harm caused to VarTec by the Commission's illegal taking of its service mark is irreparable at law, because a monetary award will not adequately compensate VarTec for the damage to its goodwill and reputation arising out of the Commission's taking of its service mark.

The Commission's proposal also would cause customer confusion and a loss of consumer confidence, and it would cause VarTec to lose many customers that it will never be able to recover. In short, it would cause the loss of business opportunities that can never be fully and fairly restored. VarTec's livelihood is its goodwill and customer base. Therefore, the elimination of its CACs would

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<sup>42</sup> Elrod v. Burns, 427 U.S. 347, 373 (1976); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

<sup>43</sup> See Joseph Scott Co. v. Scott Swimming Pools, Inc., 764 F.2d 62, 66 (2d Cir. 1985); Sears, Roebuck and Co., v. Sears Financial Network, Inc., 576 F. Supp. 857, 864 (D.D.C. 1983); see also, Ringling Bros.-Barnum & Bailey v. Celozzi-Ettelson, 855 F.2d 480, 485 (7th Cir. 1988).

cause a significant decrease in its customer base which would threaten VarTec's viability as a business. This type of harm has been recognized by the courts as the type of harm that would be "irreparable."<sup>44</sup> In short, the Commission's actions will have a devastating and irreversible affect on VarTec's business and, therefore, VarTec will be harmed irreparably unless a stay is granted.

**D. Others Will Not Suffer Substantial Harm by Grant of the Stay**

No other parties will suffer harm from a grant of the stay requested herein. To the contrary, by granting this stay current CAC owners will be allowed to maintain their current CACs and carry on business as usual. "An order maintaining the status quo is appropriate where a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant."<sup>45</sup> The stay will allow the Commission sufficient time to consider the merits of VarTec's grandfathering proposal. No showing has been made that a delay of the few weeks or months that is necessary for this purpose would create immediate CAC exhaustion problems.

**E. A Stay Will Serve the Public Interest**

Clearly, the public interest is best served by granting this stay. Many sectors of the public will benefit from this stay. The party that will most benefit from this stay is the consumer. The consumer will be able to continue to enjoy the current process of accessing alternative long distance carriers at

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<sup>44</sup> T.I.M.E.-D.C., Inc. v. I.A.M. National Pension Fund, 597 F. Supp. 256, 264 (D.D.C. 1984) (recognizing loss of customer base that company will not be likely to recover as irreparable harm); T.I.M.E.-D.C., Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 630 (N.D.N.Y. 1984) (recognizing loss of consumer confidence and business opportunities as irreparable harm).

<sup>45</sup> Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d at 844.

significant cost savings to those consumers. The consumer will not have to be reeducated as to how to access its current "dial-around" carriers, unless and until the Commission determines that VarTec's grandfathering plan is not the best means of achieving its objectives.

The long distance carriers will obviously benefit from this stay because they will be allowed to operate without the added expense of marketing the existence of their new CACs, the cost of which they would eventually have to pass on to the consumer. Furthermore, these companies would not lose the business that they have currently generated by their past marketing. This, again, would foster competition.

Lastly, both consumers and the long distance carriers would benefit because more CACs would be available in the long run if VarTec's plan is ultimately approved, which would allow new entrants into the market and, again, increase competition. The Commission's current plan fails to carry out its stated goals and does not benefit the public because it decreases competition and injures the consumer.

### **III. CONCLUSION**

For the foregoing reasons discussed herein, VarTec Telecom, Inc. respectfully requests that the Commission stay its Second Report and Order. In view of the strong likelihood that VarTec will prevail on the merits of its appeal and the irreparable harm to VarTec that will occur if this stay

is not granted, such a stay is appropriate. This stay will not substantially harm any party and would serve the public interest. Accordingly, the Commission should grant VarTec's motion for stay.

Respectfully submitted,

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